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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

GARY E. WAGNER,

Respondent.
_____/

CONFIDENTIAL

Case No. 66,037
(05A83C65 - Naylor)
(05A84C08 - Simon)

COMPLAINANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

The Florida Bar will address only those matters raised by Respondent's written argument received by mail on March 20, 1986. In all other respects, the Bar maintains its position as reflected in the main brief and authorities therein cited.

POINT INVOLVED ON APPEAL

WHETHER THE REFEREE'S FINDINGS OF FACT ARE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE AND ARE NOT CLEARLY ERRONEOUS.

ARGUMENT

THE REFEREE'S FINDINGS OF FACT ARE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE AND ARE NOT CLEARLY ERRONEOUS OR WITHOUT SUPPORT IN THE RECORD.

Respondent has made no showing that the referee's findings are clearly erroneous or unsupported by the evidence. In fact, respondent's written argument makes only bare assertions of facts allegedly presented by the record in this case but makes no specific references to the record in support of same. The referee's findings were based upon the evidence before him. It is well settled that a referee's findings of fact will be upheld unless they are clearly erroneous or without support in the evidence. Those findings have the same presumption of correctness as the judgment of the trier of fact in a civil proceeding. Fla. Bar Integr. Rule, art. XI, Rule 11.06(9)(a)(1). In The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978), this court addressed the standard of review of a referee's findings of fact where conflicting testimony had been presented. The court held that fact finding was the referee's responsibility which should be upheld unless clearly erroneous or without support in the evidence citing The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968). The court then found that the two reports involved were supported by:

> "...competent and substantial evidence which clearly and convincingly shows that Hirsch has violated the Code of Professional Responsibility in the respects charged. We approve the findings of fact and conclusions filed by the Referees." At page 857.

Later, in The Florida Bar v. Hoffer, 383 So.2d 639 (Fla. 1980) the court stated at page 642 its duty in these cases:

> "Our responsibility in a disciplinary proceeding is to review the referee's report and, if his recommendation of guilt is supported by the record, to impose an appropriate penalty, The Florida Bar v. Hirsch, 359, So.2d 856 (Fla. 1978). The referee, as our fact finder, properly resolves conflicts in the evidence. See The Florida Bar v. Rose, 187 So.2d 329 (Fla. 1966). We have reviewed the record and the report of the referee and we find that the referee's findings of fact and recommendations of guilt are supported by clear and convincing evidence."

The Rose case noted that the referee is in the best position to consider and decide conflicting evidence.

Most recently, in The Florida Bar v. Heckler, 475 So.2d 1240 (Fla. 1985) the court overturned a referee's finding of fact. Addressing the weight given those findings in disciplinary cases, the court wrote at page 1242:

> "It is well established that a referee's finding of fact is presumed correct and will be upheld unless clearly erroneous or lacking in evidentiary support. The Florida Bar v. Baron, 392 So.2d 1318 (Fla. 1981); The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978)."

It simply is inappropriate for the Respondent to attempt to retry

his case in this forum after the referee has made his findings of fact based on clear and convincing evidence.

The record reflects solid evidence for the referee's findings of fact in every respect. Although there may have been conflicting testimony, the referee considered the evidence presented to him and was best able to view the demeanor and judge the credibility of the witnesses. Respondent, in his written argument, simply puts forth a version most favorable to himself without providing support for his conclusions.

Respondent claims that without his accounting the existence of the $10,000.00 shortage in the Holt/Naylor trust funds would never have been detected by The Florida Bar. In Section II, Count I, paragraph 2, the referee notes that respondent failed to deposit the $10,000.00 and cites Bar Exhibit 2, p.77; referee Hearing Transcript, p.12 and 32 and following and p. 152 and following. On pages 12 and following, investigator for The Florida Bar, Claude Meadow, testified that respondent did provide a sworn affidavit stating he had received $124,783.44 from the Exchange Bank in Tampa and these funds were placed in the trust account at the Bank of Inverness. However, it was Mr. Meadow who discovered the shortage when subsequently reviewing respondent's subpoenaed trust account bank records. Respondent was not the one who "brought up" the $10,000.00

shortage as The Florida Bar discovered same through the contradiction between respondent's sworn affidavit and subpoenaed bank records. Respondent had little recollection of where the money went.

Respondent further claims that his uncontradicted testimony shows that the accounting given to Ms. Naylor was sufficient and what she had requested. The referee noted that the accounting was unsatisfactory to Ms. Naylor and cites the referee Final Hearing Transcript p. 13 wherein Ms. Naylor states the accounting did not satisfactorily set forth the disposition of trust assets. The referee's finding is also supported by Mr. Fitzpatrick's testimony that he advised Ms. Naylor the accounting was totally inadequate. See referee Final Hearing Transcript p. 34.

Respondent maintains that the referee "entirely overlooked" the fact that the loans made from the Holt/Naylor trust to Bud Allen were adequately secured by chattel mortgages on all of Mr. Allen's equipment. The question of adequate security is one of fact. The referee reviewed the evidence presented and made his determination accordingly. The referee also noted respondent's misconduct involved the making of loans to a party he knew to be a poor financial risk without fully disclosing such to his client and obtaining her approval. In paragraph 5 of his

written argument, respondent seems to be saying that Mrs. Holt authorized any and all of these loans because she would be receiving a higher rate of interest and there would have been monthly income for her daughter instead of a lump sum payment if something happened to her. This statement typifies the referee's finding that respondent completely ignored the best interest of his client by investing trust funds with a person respondent knew had a poor financial reputation. Additional support for this finding is that respondent "laundered" these funds through his own business for the express purpose of creditor avoidance. Furthermore, respondent loaned trust funds to an Allen corporation that was not even functioning. See referee report Section II, Count I, paragraph 5 citing Bar Exhibit No. 1, p. 61 and 97, Bar Exhibit No. 12, Sub-Exhibit J.

As for respondent's claim that delay in these proceedings has caused him great personal and professional difficulty, The Bar reiterates its position respondent was the party who requested the delays. Any adverse consequences arising from respondent's conduct are his own doing. The Bar properly carried out its prescribed function under the Rules of The Supreme Court of Florida to seek discipline for proven misconduct. Moreover, Respondent's allegations that Grievance Committee members breached confidentiality and thereby caused him further prejudice

are not supported by evidence of any kind beyond his own testimony.

Respondent makes the curious argument that if his license to practice is taken away he will have no means by which to repay the amounts owed and to support his family. There are numerous other occupations respondent may pursue which will allow for repayment and also adequately provide for his family. Perhaps respondent should have shown appreciation for his privilege to practice law much earlier by refraining from the misconduct involved herein. Simply stated, respondent has made no showing that the referee's findings of fact are clearly erroneous and without evidentiary support. The referee's total findings in fact warrant the full support of this court and should be upheld.

CONCLUSION

Wherefore, The Board of Governors of The Florida Bar respectfully prays this Honorable Court will review the referee's Report and recommendations, approve the findings of fact and recommendation of guilt; but reject his recommended discipline of an 18 month suspension followed by three years probation and order instead that he be disbarred and condition readmission upon full restitution in the amounts of $35,000 to Nancy Naylor and $69,000 to Robert L. Simon followed by three years probation under the terms recommended by the referee and pay costs in this proceeding currently totalling $4,597.56.

Respectfully submitted,

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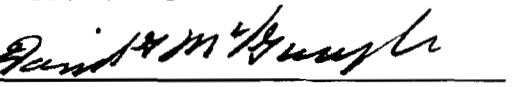
By: 
David G. McGunegle
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Complainant's Reply Brief has been furnished, by regular U.S. Mail to The Supreme Court of Florida, The Supreme Court Building, Tallahassee, Florida 32301; a copy of the foregoing Complainant's Reply Brief has been furnished, by regular U.S. Mail, to Gary E. Wagner, P. O. Box 2439, Crystal River, Florida 32629; and a copy of the foregoing Complainant's Reply Brief has been furnished, by regular U.S. Mail, to Gary E. Wagner, P. O. Box 44, Beverly Hills, Florida 32665; and a copy of the foregoing Complainant's Reply Brief has been furnished, by regular U.S. Mail, to Staff Counsel, The Florida Bar, Tallahassee, Florida 32301 on this 27th day of March, 1986.

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